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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-703

ACKERMAN-CHILLINGWORTH, Division of MARSH & MCLENNAN, INCORPORATED, a Delaware corporation, *et al.*, *Petitioners,*

vs.

PACIFIC ELECTRICAL CONTRACTORS ASSOCIATION, a Hawaii non-profit corporation, *et al.*, *Respondents.*

BRIEF IN OPPOSITION

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PACIFIC ELECTRICAL CONTRACTORS ASSOCIATION, a Hawaii non-profit corporation, *et al.*,
Respondents.

BRIEF IN OPPOSITION

Respondents Pacific Electrical Contractors Association and Walter T. Oda respectfully pray that the petition for a writ of certiorari filed herein be denied.

OPINIONS BELOW

The Opinion of the District Court for the District of Hawaii is reported at 405 F.Supp. 99 (1975). The Opinion of the Court of Appeals for the Ninth Circuit is reported at 579 F.2d 484 (1978).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Supreme Court should grant certiorari to review affirmance of an interlocutory order.

2. Whether both the District Court and Courts of Appeals erred in holding that petitioners failed to show any evidence of a boycott.

3. Whether the lower court erred in denying petitioners' Motion for Summary Judgment and granting respondents' Motions for Summary Judgment when the respondents' motivations for adopting a superior insurance program were recorded long before there was a hint of litigation.

COUNTER-STATEMENT OF STATUTES AND RULES INVOLVED

In addition to Section 1 of the Sherman Act, 15 U.S.C. § 1 and Rule 56(c) of the Federal Rules of Civil Procedure, this case involves 28 U.S.C. § 1292(a)(1) and Rule 54 of the Federal Rules of Civil Procedure. The latter are set forth in the Appendix to this Brief in Opposition.

COUNTER-STATEMENT OF THE CASE

Introduction

The "Statement of the Case" prepared by petitioners bears slight resemblance to the facts in the record.

The decisions of the courts below turn on the unique facts of this case, which demonstrate the development of the proverbial "better mousetrap" by insurance consumers and beneficiaries.

As noted by the Court of Appeals,

> Overall, the group insurance plan, with its competitive bidding, dividend plan, and employee safety and rehabilitation programs, increased competition in Hawaii's insurance market. (579 F.2d at 492, Appendix A at p. 13).

How did the vendors of the old-style mousetraps respond to this increased competition in Hawaii's insurance market? Petitioners' "Statement of the Case" ignores the issue. Petitioners boldly claim that respondents have eliminated competition. Yet, as found by the District Court, "Plaintiffs, for their own reasons, *did not attempt to compete with Oda.*" (405 F.Supp. at 108, Appendix B at p. 14, italics in original).

Instead, petitioners raised a $35,000 war chest from the Board of Underwriters of Hawaii to squelch the competitive challenge by litigation. (Doc. 1011, R. 724)* In the words of the District Court:

> None of the plaintiffs sought to compete with Oda or Yamada for the business of the electrical contractors under the group plan. Rather, they first sought a declaration from the Insurance Commission that the plan was illegal. When the Commission and Attorney General concluded that there did not appear to be a violation of the Hawaii Insurance Law, plaintiffs instituted the present action. (405 F.Supp. at 106-07, Appendix B at p. 11).

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*Record references are to the record transmitted to The Ninth Circuit Court of Appeals. Respondents assume that Petitioners complied with Rule 21(1) by filing with this Court "the entire record in the court to which certiorari is addressed."

Petitioners chose to remain aloof from the rough and tumble of competition. Rather than developing their own superior mousetrap, petitioners ask the Courts to restore the peaceful status quo.

In light of the distortions, inaccuracies and curious omissions in petitioner's "Statement of the Case", a detailed Counter-Statement is needed to place their petition in context.

Claims and counterclaims

Petitioners filed a civil action on September 6, 1974, seeking damages and injunctive relief for an alleged violation of 15 U.S.C. § 1 and damages for an alleged violation of 29 U.S.C. §§ 158(b)(4)(ii) and 158(e). Respondents PECA and Oda counterclaimed, alleging that petitioners and others conspired to thwart implementation of respondents' innovative approach to workmen's compensation insurance, and attempted to monopolize trade in workmen's compensation insurance, in violation of 15 U.S.C. §§ 1 and 2.

After extensive discovery, both sides filed cross-motions for summary judgment on petitioners' claims. On November 25, 1975, the District Court denied petitioners' motion and granted respondents' motions. Petitioners took an interlocutory appeal, pursuant to 28 U.S.C. § 1292(a)(1). The Ninth Circuit Court of Appeals majority, characterizing the District Court's opinion as "excellent" and a "thorough exposition", affirmed by a 2-1 vote. The panel unanimously denied petitioners' petition for rehearing and suggestion for a rehearing en banc.

The parties

Petitioners are general agents and solicitors of insurance including workmen's compensation insurance, in Hawaii. Under Hawaii law, general agents are authorized by insurance companies to solicit applications for insurance and effectuate policies, while solicitors are salesmen appointed by general agents primarily to solicit applications for insurance and to collect premiums on a commission basis.

Respondent Pacific Electrical Contractors Association ("PECA") is a non-profit incorporated trade association which, on behalf of approximately 128 electrical contractors, engaged in collective bargaining with Respondent International Brotherhood of Electrical Workers, Local No. 1186 ("IBEW"). Respondent Walter T. Oda ("Oda") is executive secretary of PECA; respondent Akito Fujikawa ("Fujikawa") is business manager of IBEW. Sixty-three electrical contractors who employ IBEW union members belong to PECA, while all contractors are bound by the terms of the collective bargaining agreement.

Insurance Company of North America ("INA") and its subsidiary Pacific Employers Insurance Company ("PEIC") were sued by petitioners but are not respondents here. (See footnote 2 of Petition, p. 2).

Prior to 1974, the electrical contractors in Hawaii purchased their workmen's compensation insurance individually from at least 22 different incurance carriers and approximately 20 insurance agencies. (Doc. 2301, R. 1140). Neither INA nor PEIC were on the list.

Anticompetitive aspects of Hawaii insurance law

Several aspects of state insurance law dampen competition among workmen's compensation carriers. Insurers are required by statute to file their rates with the Insurance Commissioner, and most insurers satisfy this obligation by subscribing to a rating bureau, which files the same rates on behalf of all its members. See Hawaii Revised Statutes § 432-694. Insurers may not give preferred premium rates to group purchasers. Hawaii Revised Statutes § 431-693.

The Martin E. Segal Company ("Segal") an insurance consultant to PECA and IBEW, reported in 1973 that, due to these factors:

> In short, Workmen's Compensation insurance rates are what they are and there is little that can be done about it. It is unlikely, therefore, that the Association can achieve any immediate reduction in rates by putting all of its premiums into one basket. (Doc. 2486, R. 423).

Thus, prior to respondents' initiative, the workmen's compensation insurance business in Hawaii was something less than a textbook model of vigorous competition.

Safety groups-dividend groups

However, Hawaii's insurance law does permit employers in an occupational field to form "safety groups" for the purpose of purchasing their insurance from a single carrier. Hawaii Revised Statutes § 431-693(3). Although group purchasing would not yield lower premium rates, several characteristics of safety groups make their use attractive in reducing the cost of insurance in an otherwise relatively noncompetitive industry.

Safety groups are designed to provide a mechanism for employers, workers, and an insurance company to cooperate to reduce occupational hazards and to improve rehabilitation programs. If successful, the increased effectiveness of such safety and rehabilitation programs reduces the size of insurance premiums.

Further, dividends are payable at the end of the policy term, based on the insured's claims and the insurer's costs. When dealing with a safety group policy, insurance carriers are more likely to declare large dividends rather than risk losing business.

Moreover, all employers in a safety group are eligible to receive dividends, even though carriers do not generally pay dividends to small employers with "small" premiums. This factor was deemed particularly attractive in the electrical contracting trade, which consists primarily of small employers.

As noted in the insurance consultant's report:

> Because of the anticompetitive restrictions cited above, dividends have become an important fact of life in Workmen's Compensation insurance. Dividends are not subject to regulation, and it is therefore at this point that insurance carriers who can beat the statutory rates, do so. . . . It is probable that the group as a whole, because of its size, can obtain a more favorable dividend plan than its individual members. In fact, it is likely that many of the employer-members do not pay enough premium to even be considered for a dividend based on their individual experience. (Doc. 2486, R. 423).

The consultant recommended that "if the Association is interested in forming a dividend group, then it can shop

for an insurance carrier on the basis of its willingness to put members on a group divided plan and on the generosity of its dividend plan." *(Id.)*

Role of Association

The consultant also noted that the Employers Association played a vital role in safety groups:

> [T]he Association must be actively involved in promoting safety among its members. The promotion of safety becomes feasible and desirable for the Association because of its role as go-between for insurer and members and because of the fact that all claims information for its members can now be obtained from one central clearing house—the insurance carrier. *(Id.)*

Union demand

In May, 1973, the IBEW made contract-renewal proposals, including a proposal that workmen's compensation insurance be provided by a Taft-Hartley trust fund or by purchase from a single carrier. The union believed either plan would benefit union members by providing for better claims service through a centralized administration, and that a single insurer would have greater incentive and opportunity to create better safety and rehabilitation programs.

Despite initial reluctance to the single-carrier proposal, PECA agreed to be bound by the recommendations of the insurance consultant. The union argued that by managing the plan, PECA could supplement its income by charging an administration fee. PECA initially considered having dividends under the plan made payable to PECA, but

eventually rejected this concept. As an alternative, Oda suggested that he be named an agent of record for commission purposes, and pay over his net commissions (after personal taxes) to PECA.

Oda had been a licensed insurance solicitor for many years for the Yamada Insurance Agency ("Yamada"), a general agent. An agent of record is the solicitor who sells a particular policy to a particular customer.

Consultant's recommendation

In September, 1973, the Segal Company recommended a single-carrier safety group workmen's compensation insurance plan. At an October meeting of PECA members (to which non-member contractors were invited), a Segal officer explained the insurance proposal, and anticipated savings. The membership approved the following amendment to Article 19 of the collective bargaining agreement:

> Section 1. The parties agree that present practices and procedures for compensation of employees for occupational illness and injuries are unsatisfactory, and require substantial improvement.
>
> Section 2. The parties agree that all Employers will participate in an "Association Dividend Group Plan" providing for workmen's compensation insurance coverage for their employees, as recommended by the actuary designated by the parties. The Plan will be administered by PECA. The Union shall be consulted by PECA prior to making any important policy decisions which may affect the employees.
>
> Section 3. The Plan shall be initiated February 1, 1974.

Carrier selected by competitive bidding

The Segal Company sent a specification letter to nine insurance carriers seeking bids for the workmen's compensation insurance coverage of all signatory electrical contractors. In January, 1974, the PECA Board of Directors adopted the Segal Company recommendation that the INA proposal be accepted. The insurance would be written through the PEIC subsidiary of INA.

Role of originating broker

The originating or coordinating broker in a group workmen's compensation program earns his commission by counseling the association's safety committee, working with the carrier to establish a good safety program, keeping records on losses and processing claims, coordinating credit plans for premium payment, and auditing the carrier's claims file to assure that there is a fair basis for dividend computation. (Doc. 1129-32, R. 593-97).

Samuel Alcorn, National Vice-President of Bayly, Martin & Fay, in a memo to Trenor Thompson of Bayly, Martin & Fay of Hawaii (one of the petitioners, about whom more will be heard shortly) described the role of the originating broker, and said:

> Group Workmen's Compensation programs can be set up on a "closed" basis or on an "open" basis.
>
> A closed program is one which has a single broker of record or agent—precluding participation by any other agent or broker—even though the other agent or broker might represent the same insurance company. The open plan is an override to the originating broker, but permits any local agent or broker representing the insurance agency to place individual accounts within the program. *(Id.)*

The INA/PEIC group plan is an "open" group. INA continually insisted that the PECA plan "will be an 'open' group as all our safety groups are and that any licensed producer can participate in our group subject to our internal requirements." (Doc. 2424-25, R. 654-55).

The Yamada Insurance Agency, the general agent for whom Oda was a solicitor, entered into a non-exclusive agency agreement with INA/PEIC. (Doc. 155-165, R. 659-70). Yamada's president told Thompson of Bayly, Martin & Fay of Hawaii that any general agent representing PEIC could issue policies to electrical contractors. (Deposition of Thomas T. Takemune, February 25, 1975, at 50-53, R. 788-91). PEIC appointed Bayly, Martin & Fay of Hawaii as a general agent on August 20, 1974. (Affidavit of Clifford J. Miyoi).

The record shows that agents other than Oda sold INA/PEIC workmen's compensation insurance policies to electrical contractors in 1974 and 1975. One of the sales agents is the parent of one of the petitioners herein. Fourteen contractors placed their insurance with PEIC through brokers other than Oda.

Petitioners' erroneous claim that Oda was appointed "as exclusive agent for the group plan" (Petition, p. 5) is contrary to undisputed fact.

NAIA's advice to agents: actually make an effort to sell

One final fact of interest in the record—The National Association of Insurance Agents (NAIA), representing over 32,000 member agencies and dedicated to care for "the needs and problems of the insurance agent and the American Agency System in which he operates", (Doc.

1000, R. 745) conveyed the conclusions of its Committee on Competition to the Board of Underwriters of Hawaii in May, 1974, including, *inter alia:*

> The committee began its work with the understanding that the key to meeting the challenge of the competition was to reach the insurance consumer and convince him of the advantages of buying insurance through the American Agency system. The committee has submitted its completed report and a review of its positions indicate that independent agents can compete successfully with any other system of insurance selling, even if their price is somewhat higher, if they actually make an effort to sell. (Doc. 1000, Rec. 745-54).

It may be of interest to the Court to juxtapose this recommendation of the NAIA that its member agents "actually make an effort to sell" with the undisputed factual conclusion reached by the District Court on the facts in the instant case: "Plaintiffs, for their own reasons, *did not attempt to compete* with Oda." (405 F.Supp. at 108, Appendix B at p. 14, italics in original).

REASONS FOR DENYING THE WRIT

I. SUMMARY

1. This Court normally refuses to hear interlocutory appeals from federal courts, except in extraordinary cases. This case, though of interest to the parties involved, is not of sufficient importance to merit an exception.

2. Both the District Court and the Court of Appeals majority properly held that petitioners failed to show any evidence of a boycott. The insurance carrier which submitted the lowest bid for the dividend group policy con-

sistently stated to all concerned, including petitioners, that any duly qualified INA/PEIC agent could write policies for individual contractors. However, petitioners chose to attempt to squelch respondents' innovative insurance methods in court, rather than to make the effort to sell.

3. Respondents' motivation was properly determinable by summary adjudication since their motivations were recorded in various documents long before there was a hint of litigation.

II. THE SUPREME COURT SHOULD NOT GRANT CERTIORARI TO REVIEW AFFIRMANCE OF AN INTERLOCUTORY ORDER.

Petitioners appealed interlocutory orders of the District Court to the Court of Appeals pursuant to 28 U.S.C. § 1292(a)(1). (Petition, p. 3).

The Court of Appeals held that it had jurisdiction to consider the appeal, stating:

> Appellants requested injunctive relief in their Complaint, which the District Court denied. Moreover, the District Court order is interlocutory for purposes of appellate review since Oda and PECA's counterclaim under the Sherman Act remains pending. Whenever a court fully adjudicates a claim for an injunction and does not execute a Rule 54(b) certificate, the adjudication is interlocutory if other claims remain pending. [citations omitted]. 579 F.2d at 489, Appendix A at p. 8.

The Supreme Court normally refuses to hear interlocutory appeals from federal courts, except in extraordinary cases. *Hamilton Shoe Co. v. Wolf Brothers,* 240 U.S. 251

at 258 (1916) ("The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for denial . . ." 240 U.S. at 258).

Exceptions to this prudent policy are made occasionally where prompt final decision is a matter of great national urgency. *See e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The need for immediate review of a presidential order seizing the nation's steel mills is a far cry from the facts in the instant case, involving a dispute between insurance agents and solicitors over $8,095.23 in commissions (Doc. 517, R. 820-21).

III. THE DISTRICT COURT AND COURT OF APPEALS MAJORITY PROPERLY HELD THAT PETITIONERS FAILED TO SHOW ANY EVIDENCE OF A BOYCOTT.

In a lengthy opinion which carefully reviewed the facts in the record and the various claims of petitioners, the District Court found, *inter alia:*

1. "Plaintiffs have presented no evidence, however, to indicate that Oda or any of the defendants ever suggested to the contractors that they had to *buy* their insurance *through* Oda or coerced them to do so . . ." (405 F.Supp. at 106, Appendix B at p. 10, italics in original).

2. "For its part, INA insisted many times, as early as February 1974, that the PECA plan 'will be an "open" group as all our safety groups are and that any licensed producer can participate in our group subject to our internal requirements.' " *(Id.)*

3. "Yamada's president directly advised Bayly, Martin & Fay of Hawaii . . . that any general agent representing PEIC could issue policies to electrical contractors. In fact, PEIC appointed BM&F general agent on August 20, 1974, and that appointment is still in effect." *(Id.)*

4. "In addition, agents other than Oda sold INA/PEIC insurance to Mid-Pac Electric in March 1974 and 1975, and to U.S. Industries, Inc. (including as a division Wasa Electrical Service) in April 1975. The sales agent in the latter instance is one of the plaintiffs herein." *(Id.)*

5. "None of the plaintiffs sought to compete with Oda or Yamada for the business of the electrical contractors under the group plan. Rather, they first sought a declaration from the Insurance Commissioner that the plan was illegal. When the Commissioner and Attorney General concluded that there did not appear to be a violation of the Hawaii Insurance Law, plaintiffs instituted the present action." (405 F.Supp. at 106-107, Appendix B at p. 11).

6. *"Boycott of insurance agents*

"In their second theory, plaintiffs maintain that 'Each contractor is contractually prohibited from doing business with the insurance agent of its choice regardless of preference,' and that 'the labor agreement completely eliminates the plaintiffs' opportunity to compete with . . . Oda'. Plaintiffs have neither facts nor law to support this allegation." (405 F.Supp. at 108, Appendix B at p. 14).

7. "Article 19 contains no contractual obligation that its signatories deal with Oda." *(Id.)*

8. "Neither Oda nor any of the other defendants ever urged this interpretation upon any of the contractors." *(Id.)*

9. "INA continually reminded the other defendants that the group plan was an open plan: any solicitor or agent of INA/PEIC could sell and write policies. At least one plaintiff was aware of this and became a PEIC general agent." *(Id.)*

10. "Moreover, Oda was not the only solicitor to write policies under the group plan, both before and after initiation of this suit." *(Id.)*

11. "Plaintiffs, for their own reasons, *did not attempt to compete* with Oda. (*Id.*, italics in original).

12. "Plaintiffs have neither alleged nor presented evidence of an explicit group refusal to deal with all solicitors and agents save Oda/Yamada." (405 F.Supp, at 109, Appendix B at pp. 14-15).

13. "Assuming for purposes of summary judgment that a trier of fact could reasonably infer that an *implicit* agreement existed to use Oda exclusively, there would still not be a *per se* violation of § 1. . . .

". . . Under the assumed factual inference of the instant case, the contractors agreed to deal with Oda because his revenues would be paid back to the contractors' association. The inferred agreement exists not for Oda's benefit as a *competitor* of plaintiffs, but for defendants' benefit as buyers or beneficiaries of insurance." (*Id.*, italics in original)

14. "Plaintiffs did not allege or present evidence that any of defendants is forcing non-PECA members to cease dealing with all other agents and to deal with Oda/PECA in its role as a seller of insurance." *(Id.)*

15. "A majority of members of PECA, bargaining agent for all the contractors, did impose a requirement that all contractors buy insurance from the winning bidder. But the agreement did not require the contractors to give their business to Oda, and it only incidentally affected those plaintiffs who were not agents of the winning bidder, and chose not to become agents, or to write through Yamada." *(Id.)*

16. "In the instant case we have a group of buyers allegedly agreeing to deal with the seller of insurance who made them the most attractive offer . . ." (405 F.Supp. at 109, Appendix B at p. 16)

17. "The IBEW initiated its proposal for a change in the method of purchasing insurance in order to create opportunities for better claims service for its members, more effective safety plans, and better rehabilitation programs." (405 F.Supp, at 110, Appendix B at p. 17).

18. "The PECA eventually agreed to the group plan approach because it saw several direct benefits for electrical contractors in addition to the direct benefits to its employees. Better safety and rehabilitation programs could reduce premiums. Group purchasing could lead to lower retentions by carriers. Group evaluation of dividends could make all contractors eligible to receive dividends regardless of the size of their individual premiums, increasing total dividends. Commissions earned by

Oda and credited to the PECA could cover expenses incurred in administration of the plan, as well as eventually lead to reduced premiums through a negotiated lower commission." (*Id.*)

19. "With regard to Oda's role, it is clear from plaintiffs' evidence that a single broker or solicitor must coordinate the group plan if it is to achieve all of the objectives previously cited." (405 F.Supp. at 111, Appendix B at p. 18).

20. "In the § 1 context, it is not only reasonable but laudatory that the coordinating broker be someone both intimately familiar with the industry for whom the service is provided, and willing to use his profits to reduce consumer costs even further." (*Id.*)

21. "The motives of the defendants were salutary, and the economic impact beneficial, except arguably upon a handful of contractors, and upon plaintiffs with whom Oda was beginning to compete." (*Id.*)

22. "The IBEW, PECA, the Martin Segal Company, Fujikawa, and Oda, developed an idea for a superior method of buying and selling insurance. Their approach was a variant of a plan that had been used extensively in other markets but which was new to Hawaii. Any one of the plaintiffs could have developed the same idea earlier and sold it to the IBEW/PECA. They may still do so in other industries." (405 F.Supp. at 111, Appendix B at pp. 18-19).

23. "The record is clear that plaintiffs even now can compete with Oda and Yamada, although most contractors would understandably prefer to deal with Oda because of the additional benefits that may accrue to them." (405 F.Supp. at 111, Appendix B at p. 19).

24. "Plaintiffs were not innovative, however, and thus they lost some of their business to new competitors who had a superior service to offer. . . . (*Id.*)

25. "By taking the initiative as they did, the defendants have brought an element of competition into an otherwise noncompetitive market, with the probable likelihood of more safety on the job, better rehabilitation for injured workers, savings to employers, and lower prices to consumers." (*Id.*)

26. "This Court has assumed for the purpose of this decision that the majority of electrical contractors agreed with each other and with Oda to cease dealing with the plaintiffs and to deal only with Oda, and required an unwilling minority of contractors to buy from INA, increasing the likelihood they would buy through Oda." (405 F. Supp. at 111, Appendix B at p. 19).

NB. This assumption by the District Court was not accurately summarized in the Court of Appeals decision. (See 579 F.2d at 491, Appendix at p. 12):

> 8. In this summary proceeding the District Court, despite the dearth of evidence, assumed that a majority of the PECA—member contractors and Oda agreed that henceforth the contractors would purchase insurance only through Oda, compelling all signatory contractors to the collective bargaining agreement to do likewise. 405 F.Supp. at 111.

27. ". . . [N]othing in the record suggests, much less would support an inference, that their purpose was to eliminate or damage plaintiff[s], to force [them] to comply with unlawful demands, rather than to get better [service]." (405 F.Supp. at 111, Appendix B at p. 19, brackets in original)

28. ". . . [P]laintiffs here, after seeking and obtaining full discovery, after having been satified to move for summary judgment, presented no evidence to contradict the reasonableness of defendants' action." (405 F.Supp. at 111-12, Appendix B at p. 20).

The majority opinion of the Court of Appeals concurred with the findings and conclusions of the District Court, stating *inter alia*:

1. "The appellants alleged that Oda, with his aggressive solicitation tactics, coerced contractors to purchase PEIC policies through him. The record does not support that claim. It is true that Oda firmly told contractors that they could not renew their coverage with their present carriers and that it was necessary that they purchase a PEIC group policy. This was his responsibility as business manager of PECA. While he encouraged the contractors to obtain their policies through him, it was evident that he never told any contractor that the contractor must deal through him rather than through another insurance solicitor." (579 F.2d at 488, Appendix A at p. 7).

2. "It was the legitimate desire of PECA and IBEW that Oda should write as many of the INA/PEIC policies as possible. Oda had made a very attractive offer to PECA and the contractors, *i.e.*, he would use his net commission

income to offset PECA's cost of administering the group plan. It was in the self-interest of the individual PECA-member contractors to purchase their insurance through Oda in order to reduce the expenses of PECA. Moreover, Oda aggressively solicited the business of all the signatory contractors, both members and nonmembers of PECA. He persistently reminded recalcitrant contractors that their labor agreement required that they purchase PEIC workmen's compensation insurance, sending them applications for insurance to be processed through him." (579 F.2d at 490, Appendix A at p. 10).

3. "There is, however, no support whatsoever in the record, for appellants' contention that the appellees coerced contractors to deal only with Oda. The labor agreement did not specify that only Oda could solicit the contractors' business, and the appellants presented no evidence that any contractor believed that he could not purchase a PEIC policy through the agent of his choice." (579 F.2d at 490-91, Appendix A at pp. 10-11).

4. "At numerous times, INA made it clear that any INA agent could write policies for the contractors, and INA even appointed one of the appellants as an agent. It is true that Oda, for obvious good reasons, sold the vast majority of the contractors' policies, but it is also true that other agents did, in fact, sell some of the policies." (579 F.2d at 491, Appendix A at p. 11).

5. "Unlike Broadway-Hale Stores in *Klor's*, PECA, Oda, and the contractors agreed to deal with Oda alone, not to improve Oda's competitive position as an insurance solicitor but to aid PECA and to improve the quality of the

contractors' insurance plan. Nor were the appellants able to show any concerted refusal to deal, designed so as to influence the trade practices of the appellants." (579 F.2d at 490, Appendix A at p. 10).

6. "The contractors who may have preferred not to join the plan are not boycott victims, and the impact of the arrangement on insurance agents is no different qualitatively because of the mandatory nature of the plan. (579 F.2d at 490, Appendix A at p. 11).

7. ". . . [T]here is no indication here that the appellees established their group plan of insurance, with its alleged boycott of appellants, in order to protect Oda from competing insurance solicitors. Rather, their motive was clearly shown to be the improvement of the quality of their insurance coverage and the decrease of its cost." (579 F.2d at 490-91, Appendix A at p. 11).

8. "In essence, PECA sought to obtain a better product, insurance, at a lower cost, a goal that would appear to enhance, rather than diminish competition among suppliers of that product. Oda's underwriting of the policies furthered a salutary objective." (579 F.2d at 491, Appendix A at p. 13).

9. "Appellants attack the professed purpose of appellees as a purpose designed to disguise sinister, monopolistic intentions. They have, however, presented no evidence of any such anticompetitive motivation on the part of IBEW, PECA, Oda, PEIC or INA." (579 F.2d at 492, Appendix A at p. 13).

10. "Here, the decision that Oda should underwrite policies surely may have deprived the appellants of some business. Yet it cannot be said that this fact alone corrupted the plan to the extent that it constituted an unreasonable restraint of trade. The Sherman Act protects competition, not competitors who may suffer some pecuniary harm because of the competitive process. A contrary decision would stand the Act on its head. Overall, the group insurance plan, with its competitive bidding, dividend plan, and employee safety and rehabilitation programs, increased competition in Hawaii's insurance market. . . . Appellants' losses resulted from the initiative taken by appellees in developing a better plan for workmen's compensation insurance, not from any artificial impediments to appellants' ability to do likewise or to otherwise compete in a reasonable way." (579 F.2d at 492, Appendix A at pp. 13-14).

11. "Furthermore, the appellants are not presently precluded from competing with Yamada and Oda. As we have already noted, INA has indicated that other insurance agents may write group policies for contractors, and it has already licensed one of the appellants for that purpose." (579 F.2d at 492, Appendix A at p. 14).

In the fact of these undisputed facts, petitioners erroneously assert that Oda was appointed "as exclusive agent for the group plan" (Petition, p. 5). Petitioners' conclusion is contrary to fact.

Petitioners' also refer to Oda's success as a solicitor (114 out of 128 contractors buying their INA|PEIC policies through him) as evidence that Oda has an unfair advantage over them. Yet petitioners inexplicably neglected to bring

to the Court's attention the findings of the lower courts that petitioners chose not to compete with Oda.

There is no evidence in the record that any electrical contractor in Hawaii has been deprived of the right to choose whichever insurance agent he wishes in order to purchase an INA/PEIC workmen's compensation insurance policy. The INA/PEIC insurance company was selected by PECA's insurance consultant on the basis of competitive bidding. INA/PEIC stated that "any licensed producer can participate in our group" and appointed one of the Petitioners as a general agent.

Petitioners are not the victims of a conspiratorial boycott—they are the victims of their own lethargy and failure to compete.

IV. NEITHER COURT ERRED IN FINDING THE CASE AS TO RESPONDENTS' MOTIVATION RIPE FOR SUMMARY ADJUDICATION.

Respondents PECA and Oda filed their Motion for Summary Judgment on June 20, 1975. (R. 374-821). The District Court, in its decision issued five months later, noted that both sides conducted extensive discovery, with over a thousand pages of documents produced and catalogued. The Court had the benefit of deposition testimony taken in Honolulu and San Francisco, as well as numerous affidavits. Petitioners did *not* submit any Rule 56(f) affidavit seeking additional time in order to conduct further discovery in an attempt to justify their suspicion that respondents had concealed a sinister motivation.

Both the District Court and the Circuit Court were mindful of this Court's admonition that summary procedures be used sparingly in complex antitrust litigation. *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473 (1962). Yet, as is evident by the careful review of the undisputed facts in both opinions, this case was ready for summary adjudication, and was properly decided. The workmen's compensation insurance group plan was an "open" group, since any licensed INA/PEIC agent could sell policies to the electrical contractors, and other agents did so. Yet petitioners chose not to compete with Oda.

In the instant case, respondents' motivation was properly determinable by the Court for, as the District Court noted: "The defendants' motivations were recorded in various documents long before there was a hint of litigation." (405 F.Supp. at 103, Appendix B at p. 6).

The Ninth Circuit majority carefully considered the record in the light most favorable to petitioners:

> In reviewing the propriety of the District Court's summary judgment in a complex antitrust case, we look at the record in the light most favorable to the appellants, here, the parties opposing the motion for summary judgment that was granted. *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473, 82 S.Ct. 486, 7 L. Ed.2d 458 (1962). (579 F.2d at 489, Appendix A at p. 9).

The majority considered and rejected petitioners' claim that respondents' motivations as disclosed by the record were a mere disguise; stating:

The District Court ably explained the considerations that motivated IBEW and PECA to implement the group plan:

> The IBEW initiated its proposal for a change in the method of purchasing insurance in order to create opportunities for better claims service for its members, more effective safety plans, and better rehabilitation programs. The PECA eventually agreed to the group-plan approach because it saw several direct benefits for electrical contractors in addition to the direct benefits to its employees. Better safety and rehabilitation programs could reduce premiums. Group purchasing could lead to lower retentions by the carriers. Group evaluation of dividends could make all contractors eligible to receive dividends regardless of the size of their individual premiums, increasing total dividends. Commissions earned by Oda and credited to the PECA could cover expenses incurred in administration of the plan, as well as eventually lead to reduced premiums through a negotiated lower commission.

405 F.Supp. at 110. In essence, PECA sought to obtain a better product, insurance, at a lower cost, a goal that would appear to enhance, rather than diminish, competition among suppliers of that product. Oda's underwriting of the policies furthered a salutary objective. Appellants attack the professed purpose of appellees as a purpose designed to disguise sinister, monopolistic intentions. They have, however, presented no evidence of any such anticompetitive motivation on the part of IBEW, PECA, Oda, PEIC, or INA. (579 Fd2d at 491-92, Appendix A at p. 12-13).

Respondents' motivations having been extensively documented far in advance of any hint of litigation, there

was no genuine issue of material fact in dispute on this point, and the case was properly decided by summary adjudication.

CONCLUSION

The instant case was properly decided, based upon its unique facts. For whatever tactical or strategic reasons that may have seemed meritorious to them at the time, petitioners abdicated the field to Oda in 1974 and did not compete with him in the sale of INA/PEIC workmen's compensation insurance policies to electrical contractors in Hawaii.

The sale of workmen's compensation insurance to electrical contractors in Hawaii, prior to respondents' initiative, was relatively uncompetitive. By state law, employers had to purchase the insurance (or qualify as self-insured) and there is no price competition on premiums. Claims service, safety engineering, and rehabilitation programs were unsatisfactory in the view of the employees' representative. Dividends, if available at all, were only offered to large employers. Each contractor was free to deal with the agent of his choice in the mandatory purchase of an inferior product.

There is no dispute that respondents developed a better product—dividend group workmen's compensation insurance for Hawaii's electrical contractors. The carrier offering this product was selected by competitive bidding. Petitioners are not precluded from selling INA/PEIC policies

to individual contractors. Petitioners need only heed the advice of their own trade association's Committee on Competition:

> . . . [I]ndependent agents can compete successfully with any other system of insurance selling, even if their price is somewhat higher, if they actually make an effort to sell. (Doc. 1000, R. 745-754).

Therefore, respondents PECA and Oda respectfully request that the Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

Respectfully Submitted,

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November 21, 1978.

(Appendix Follows)

APPENDIX

APPENDIX

Statutes and Rules

(28 U.S.C. § 1292(a)(1))

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

Federal Rules of Civil Procedure

Rule 54

Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such

determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.